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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re C.C. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KIRA C.,

Defendant and Appellant.

D062121

(Super. Ct. No. EJ3017A-B)

APPEALS from orders of the Superior Court of San Diego County, Michael J. Martindill, Juvenile Court Referee. Affirmed.

Kira C. appeals from orders of the juvenile court on juvenile dependency petitions filed by the San Diego Health and Human Services Agency (the Agency) on behalf of her minor children, C.C. (born 2000) and K.C. (born 2002, together the children). She contends the juvenile court erred at a postpermanency status review hearing when it denied her request for return of the children because (1) the court

misapplied the preponderance of the evidence burden of proof at the hearing, (2) the order denying placement was not supported by sufficient evidence, and (3) the court erred by not considering the children's wishes that they wanted to return home. She also asserts that the Agency failed to make a proper inquiry of the children's Indian ancestry under the Indian Child Welfare Act (ICWA, 25 U.S.C. § 1901 et seq.). We reject her assertions and affirm the orders.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. History Leading Up to the Children's Detention

In July 2005, Kira and her two children came to the attention of the Agency after she was arrested for stabbing a boyfriend and it was reported that she had a history of marijuana and cocaine use. In March 2006, the Agency received a report of child neglect. At that time, Kira and the children were living with another boyfriend. In December 2007, the Agency received a report of general neglect while Kira and the children were living with a different boyfriend, Douglas. Kira used marijuana around the children to treat her insomnia and bipolar disorder. Between 2006 and March 2008, Kira suffered multiple arrests and one conviction.

In April and May 2008, the Agency received several reports of general neglect. It was reported that Kira was not following up on C.C.'s mental health issues and that C.C. was always hungry. In July and August 2008, it was reported that Kira and Douglas were abusing drugs, Kira used methamphetamine, the children were hungry, and that the family had been evicted and would be moving to a motor home parked on the property of Douglas's mother. Kira married Douglas in August 2008.

In early September 2008, the Agency investigated a report that Kira and Douglas attended a back-to-school night while under the influence. C.C. told a classmate that he wanted to kill his parents and that he wanted to die. The family was reportedly living in a car after Douglas's mother kicked them out over apparent drug use. There were numerous concerns that the children were not clean and did not have enough to eat. C.C. was becoming angrier, and K.C. was withdrawing. Eventually, the children stopped attending school and the Agency lost contact with the family.

In mid-September 2008, the Agency started an investigation, which ultimately led to petitions being filed in mid-October 2008. During this time period, C.C. threatened to harm himself and other children, however, Kira was not following up on services for C.C. The Agency also received a report that Kira hit Douglas on the head with a plate, left with the children and they were staying with a man named Joe who had a criminal history and was a known drug abuser.

On October 13, 2008, Joe died from an apparent self-inflicted gunshot wound while the children were in the home. At that time, the children appeared disheveled and dirty and were very knowledgeable about Kira and Douglas's drug use. The Agency took the children to Polinsky Children's Center and filed petitions on their behalf a few days later. (Welf. & Inst. Code, § 300, subd. (b), undesignated statutory references are to this code.)

#### B. History after the Children's Detention

The jurisdiction/disposition report noted that Kira and Douglas moved in with her ex-boyfriend. Kira understood that the court wanted her to show stability and

participate in services. Kira appeared motivated to quickly reunify with the children, find a job and get an apartment. She also claimed that she and Douglas had been drug free since the children were removed.

In December 2008, the juvenile court assumed jurisdiction and declared the children dependents of the juvenile court. It removed the children from Kira's custody and found it would be detrimental to place them with their father. Kira's service objectives included living drug free and maintaining stable and suitable housing by May 2009.

Kira did not meet these objectives by the time of the June 2009 status report. Kira continued to live with Douglas and struggled with her sobriety, once testing positive for marijuana and twice testing positive for methamphetamine. She had four unexcused absences from her "SARMS" program. Kira's individual therapist was concerned about her involvement with Douglas based on his drug use and recent legal issues. A psychologist evaluated Kira and diagnosed her with bipolar disorder based on her history, substance abuse, partner and parent-child relational problems and child neglect.

In the meantime, the children had been placed together in a foster home, adjusted well and stated that they liked their foster parents. A psychologist diagnosed C.C. with posttraumatic stress disorder (PTSD), parent-child relational problem and neglect and emotional abuse of child. The psychologist opined that C.C.'s PTSD was caused by "the gravely deficient parenting he ha[d] received and the frightening conditions under which he ha[d] lived." Although C.C. verbally acted with "bizarre

threats and assertions," the psychologist concluded that C.C. was not psychotic, but was one of the "brightest" children he had tested in the dependency system.

A November 2009 status report indicated that Kira was unemployed, divorcing Douglas and was living with a new boyfriend, Mike, and his mother. Kira participated in bi-weekly therapy until she stopped attending in August 2009. In September 2009, Kira discontinued attending her drug treatment program and the social worker lost contact with her for a period of time. Nonetheless, Kira had clean drug tests for six months. Kira progressed to unsupervised visitation in mid-August 2009, but her visitation became inconsistent for several months.

An April 2010 status report stated that Kira had been living with Mike and his mother, but that Mike had beaten her up and she had moved in with a friend. Kira was not attending her SARMS program, was still unemployed and had not contacted the children for much of December 2009 and January 2010. Her visits resumed as supervised, but she did not attend them regularly. The social worker lost contact with Kira in February and March 2010 and was unaware of any arrangements made by Kira to participate in services.

In the meantime, in December 2009, C.C. and K.C. moved to a new foster home due to an Agency investigation of their prior home. C.C. was doing well academically and his behavior was generally positive and respectful toward his foster parents. K.C.'s academic performance was satisfactory and she was in therapy after being diagnosed with adjustment disorder. C.C. wanted to return to Kira, but

understood the social worker's concerns about Kira's lack of contact with him and K.C. K.C. wanted to live with her foster parents if she could not live with Kira.

The social worker recommended terminating Kira's services. At the April 2010 section 366.22 18-month permanency review hearing, the juvenile court found Kira had not made substantive progress with her case plan, terminated her services, ordered a permanent plan of Another Planned Permanent Living Arrangement (APPLA) for the children and set a review hearing.

#### C. History after Termination of Kira's Services

A September 2010 status review report stated that Kira lived with the mother of her ex-boyfriend Mike and worked part-time helping her. She had stopped attending her drug treatment program and had monitored visits with the children. The April 2011 status review report noted that Kira had entered an in-patient substance abuse program in January 2011 where she would receive job and housing assistance. In May 2011, both children needed a higher level of care to manage their behaviors and were moved to separate, higher level foster homes. In June 2011, Kira completed her in-patient drug treatment. In August 2011, the children began unsupervised visitation. By September 2011, Kira had moved into another home and claimed she had a final interview for a full-time job later that week.

By October 2011, the children's behaviors and symptoms had improved. That month, all parties stipulated to Kira's section 388 motion for an additional six months of services. Among other things, Kira's new case plan required her to ensure her mental and physical health was stable, participate in "Wraparound" services, establish

a safe and stable living environment, participate in family therapy with the children, comply with periodic and random drug testing and attend four to seven Narcotics Anonymous meetings per week to help ensure her sobriety.

At the April 2012 status review hearing, the social worker reported that Kira resided with a family that was willing to provide assistance to her until she "'gets back on her feet.'" Kira claimed that she worked as a care provider, that she did document editing, provided astrological reports, and designed web pages on the Internet. Because Kira had not met the goals and responsibilities on her case plan, the social worker recommended the court terminate her services. In the meantime, C.C. continued to improve his behaviors and symptoms, and K.C. was very stable within her foster home and had developed a good relationship with her foster mother. The children had visited with paternal relatives from Wyoming who were interested in having the children placed with them.

#### D. The Section 366.3 Contested Hearing

Kira testified that she moved into a one-bedroom apartment with a roommate that day and that she had not been in a relationship since July 2011. The apartment had a table, a few chairs and a mattress for the roommate. Kira claimed that other furniture would be delivered later that day, including beds for the children. Kira asserted she could not move earlier because the social worker did not approve her roommate until that day. Her share of the rent was \$500 for the first two months, but she had yet to pay any rent for the apartment. She claimed that she had the income to support the children through jobs as a mystery secret shopper, doing online

astrology/numerology reports, dream interpretation and as a "web personality." She just received approval to start her job as a mystery shopper and she has been doing astrological readings for several months, but had not yet received payment. Kira asserted that her bipolar diagnosis was incorrect because a clinician opined that she might have "adult [ADHD]." She claimed to use a breathing technique, prayer and refocusing to manage her mental health.

The family's social worker for the past three and one-half years testified regarding Kira's progress on her case plan. Kira consistently visited and contacted the children by telephone. Her visits were currently unsupervised and she was consistent in contacting the visitation coordinator. The social worker confirmed that Kira and the children were bonded and wanted to be together.

Kira has been attending bi-weekly therapy with one or both of the children since about November 2011. The children had completed their individual therapy, however, both remained on psychotropic medications and remained in the care of a psychiatrist. In particular, C.C.'s behavior had been more consistent in the previous six months, he was destroying property less often and had not talked about hurting himself.

Kira received Wraparound services to provide her assistance in running a household and give her psychiatric oversight and counseling. However, the family was at the "very beginning[]" stage of the program and had just completed the introductions. The social worker explained that he referred Kira to Wraparound services in March 2012 and not closer to the October 2011 date when the services



were ordered because he had difficulty contacting Kira during the first few months after the service order since she did not respond to phone messages. Eventually communication improved in January 2012 after Kira obtained an e-mail account.

The social worker expressed concern about Kira's sobriety because she tested positive for methamphetamine about two months earlier and then failed to drug test on two consecutive days claiming an inability to urinate, and another time claiming she could not get to the testing site. Kira had no prior history of an inability to urinate for drug tests. Although about seven months have elapsed since services were ordered, Kira provided "A.A." meeting slips for only three of the past six months. The social worker was concerned about this because her substances of choice were marijuana and methamphetamine, not alcohol. Kira told the social worker that she had slips showing verification of Twelve Step meeting attendance, but never provided them.

The social worker opined that returning the children to Kira was not in their best interests because her ability to provide safely for the children had not sufficiently changed. In particular, he noted that Kira has not been able to manage her life without the children and doubted her ability to do so would improve once the children were in her life.

At the conclusion of the hearing, the juvenile court found that over the past two months that "some changes" have occurred, but concluded that evidence of changed circumstances did not exist and it would not be in the best interest of the children to return them to Kira. The court terminated Kira's reunification services, continued the

children's permanent plan as APPLA and gave the Agency the discretion to expand Kira's visits. Kira timely appealed.

## DISCUSSION

### *I. Postpermanency Order*

#### A. Facts

At the start of the contested hearing, the juvenile court indicated that the applicable statute was section 366.3, subdivision (f), and that Kira had the burden of proof "by a preponderance of the evidence." After hearing the evidence and argument, the juvenile court made extemporaneous comments about the matter before stating its findings. During its comments, the court correctly stated that Kira had the burden to "rebut the presumption" that continued foster care was in the best interests of the children by proving by a preponderance of the evidence that further efforts at reunification were the best alternative for the children. (§ 366.3, subd. (f).) The court then stated, "While it's true that the level of proof necessary to rebut that presumption is only a preponderance of the evidence, that still means to me something more than 51, 52, 55 percent."

#### B. Analysis

Where, as here, a child is placed in long-term foster care, section 366.3 requires that the juvenile court review the child's status at least every six months. (§ 366.3, subd. (d).) In reviewing the child's status, subdivision (f) of section 366.3 requires the juvenile court to presume that "continued care is in the best interests of the child, unless the parent . . . [proves], by a preponderance of the evidence, that further efforts

at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent . . . ."

Kira asserts that the juvenile court's statements show it misapplied the burden of proof and, if it had applied the burden correctly, would have found in her favor. As a threshold matter, we agree that the juvenile court improperly attempted to equate a preponderance of the evidence to a certain percentage. A party required to prove something by a preponderance of the evidence "'need prove only that it is more likely to be true than not true.'" (CACI No. 200.)" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Nonetheless, the juvenile court applied the correct burden of proof and we accord considerable deference to the trial court in its placement decisions. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) We "'interfere only "'if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he [or she] did.'"" (*Ibid.*) Accordingly, our job on appeal is to determine whether the juvenile court abused its discretion when it impliedly found that further efforts at reunification were not the best alternative for the children. (§ 366.3, subd. (f).) After reviewing the evidence, we cannot say the juvenile court abused its discretion in rejecting Kira's request for return of the children.

The children came to the attention of the Agency in July 2005 and were detained in October 2008. During this extended time period, the children's lives were

in constant turmoil. Kira suffered numerous arrests or convictions and used drugs around the children, including marijuana and methamphetamine. The children were often generally neglected, dirty and left hungry. Their housing was not stable and they were subjected to bouts of domestic violence between Kira and her boyfriends. The children suffered from this instability with C.C. making suicide threats and displaying anger issues and bizarre behavior.

Almost seven years later, there was substantial evidence that many of Kira's deficiencies as a parent remained unresolved. Kira was unemployed during most of this time period and never obtained full-time employment. Kira moved into a new apartment on the date of the hearing, however, it was unclear how she would be able to pay for the apartment or provide for the children as she was not yet receiving any income from her claimed employment. Significantly, less than two months before the contested hearing, Kira tested positive for amphetamine and methamphetamine. Thereafter, she failed to drug test on three separate occasions, claiming she could not get to the testing site or an inability to urinate. Although Kira claimed she tested positive due to her use of herbal teas, a substance abuse counselor contacted by the Agency stated a positive test for methamphetamine could only come from a person's use of the drug. Additionally, she provided "A.A." meeting slips for only three of the past six months and no slips showing verification of Twelve Step meeting attendance. Based on this evidence, the juvenile court could reasonably conclude that Kira was still abusing drugs and that substantial risk of harm existed to the children should they be returned to her care.

While the children were bonded to Kira and wanted to return to her care, they had emotional and psychological needs that required medications, consistent specialized care and follow up. As the social worker explained, "the core of this case relie[d] heavily on [Kira's] ability to manage the care of her children day-to-day over a period of time with consistent safety from her and the persons she ha[d] around her. [Kira's] inconsistent ability to manage the limited expectations she has on herself right now indicate a significant risk to the children's well-being if they were returned to her care." Accordingly, the Agency recommended the children not return to Kira's care. Counsel for the children and a special advocate for the children agreed.

While Kira has made significant and commendable progress, on this record, the juvenile court could reasonably conclude that the best interests of the children would be best served by continuing their out-of-home placements.

Finally, we reject Kira's assertion that the juvenile court failed to take into consideration the children's statements that they wanted to live with her. The Agency concedes that considerable evidence existed showing that the children wanted to live with Kira. Nonetheless, despite this strong evidence, the Agency, counsel for the children and a special advocate for the children agreed that it was not in their best interests to return to Kira's home. Importantly, counsel for the children could not advocate for their return if, to the best of her knowledge, their return conflicted with their protection and safety. (§ 317, subd. (e)(2).) Unfortunately, the record amply supports the juvenile court's implied conclusion that the wishes of the children and their best interests simply did not coincide.

## II. ICWA

### A. Facts

Kira told the social worker that she had Native American heritage based on her canine teeth, however, she did not know what tribe, and she had no other information. At the detention hearing, Kira's attorney indicated that Kira "may" have some Native American heritage on the maternal grandmother's side. Kira filled out the ICWA form JV-130 claiming, under penalty of perjury, that she may have Indian ancestry in the Aztec/Apache tribe from the maternal grandmother's side of the family. The social worker spoke to the maternal grandmother, Toni, who lived in Wisconsin. Toni explained that she adopted Kira and that Kira is the daughter of Toni's adopted sister. Toni told the social worker that no one in the family was a member of any Native American tribe, that none of Kira's biological family members have lived on a reservation or received benefits from a tribe or the federal government, and that none of Kira's adoptive or biological family spoke a Native American language or participated in tribal political events.

At the December 2008 hearing, Kira told the court it was rumored that her birth mother was half Native American from an unknown tribe and that she was trying to contact her brother regarding the matter. The court found that ICWA did not apply, but asked Kira to provide the Agency with any additional information

### B. Analysis

ICWA provides that when a state court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, the court must give the

child's tribe notice of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.) California law imposes "an affirmative and continuing duty to inquire" whether a child involved in a dependency proceeding "may be an Indian child." (§ 224.3, subd. (a); also Cal. Rules of Court, rule 5.481(a) [imposes "an affirmative and continuing duty [on the court and other officials] to inquire whether a child is or may be an Indian child"].) When a social worker "has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information" required to be provided in the ICWA notice. (§ 224.3, subd. (c); also Cal. Rules of Court, rule 5.481(a)(4)(A)].) Thereafter, "the court must send *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the parent or legal guardian and Indian custodian of an Indian child, and the Indian child's tribe . . . ." (Cal. Rules of Court, rule 5.481(b)(1).)

Kira asserts that the court wrongly decided in December 2008 that ICWA did not apply because the Agency failed to make adequate inquiry and failed to notice the Apache Tribe and the Bureau of Indian Affairs (BIA). Specifically, she asserts the social worker should have questioned her biological mother. We reject her assertion.

Kira's biological mother is Toni's adopted sister. Toni told the social worker that Kira's adoptive and biological families did not have any Native American heritage. Based on this response, the Agency had no duty to seek out and question other family members. Moreover, the Agency had no obligation to investigate Kira's

adoption records for any possible Indian ancestry. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 40–42 [agency "must inquire as to possible Indian ancestry and act on any information it receives, but it has no duty to conduct an extensive independent investigation for information"].) Significantly, in December 2008, the juvenile court invited Kira to present any information showing she had Indian heritage. Over four years have passed and Kira has presented no additional information supporting her claimed Indian heritage. On this record, Kira's assertion of Indian ancestry amounts to mere speculation.

#### DISPOSITION

The section 366.3 postpermanency order is affirmed. The finding that ICWA does not apply is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.